JD–38–04
Jessup, MD

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

HMY ROOMSTORE, INC.

and Case 5–CA–30809

ELMER PASTORA, an Individual

Karen Itkin Roe, Esq. for the General Counsel.
Brian D. Bertonneau, Esq. (*General Counsel, Hmy Roomstore*), of Richmond, Virginia, for the Respondent.
Ricardo A. Flores, Esq. (*Public Justice Center*), of Baltimore, Maryland, for the Charging Party.

DECISION

Statement of the Case

JOHN T. CLARK, Administrative Law Judge. This case was tried in Baltimore, Maryland, on May 1, 2, and 6, 2003. The charge was filed October 23, 2002, and the complaint was issued January 30, 2003. The complaint alleges that Hmy Roomstore, Inc. (the Respondent), on or about April 26, 2002, suspended and then discharged the Charging Party and 13 other employees for engaging in a protected, concerted, work stoppage in violation of Section 8(a)(1) of the National Labor Relations Act (the Act).

During the hearing counsel for the General Counsel moved to amend the complaint by: (1) correcting the spelling of the name of dischargee Giralt, (2) removing the name of dischargee Jose Castro, and (3) alleging an additional violation of Section 8(a)(1) of the Act when the Respondent, by its counsel, allegedly failed to give employee witnesses the requisite assurances when interviewing them in accordance with *Johnnie's Poultry Co.,* 146 NLRB 770 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965). The motions were unopposed and granted.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by counsel for the General Counsel, the Respondent, and the Charging Party, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, a Virginia corporation, with an office and place of business in Jessup, Maryland, has been engaged in operating retail furniture stores and distribution and manufacturing facilities, including a distribution and manufacturing facility in Jessup, Maryland. During the 12-month period ending January 30, 2003, the Respondent sold and shipped from its Jessup, Maryland facility materials and goods valued in excess of $50,000 directly to points

located outside the State of Maryland. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Alleged Unfair Labor Practices

A. Introduction

The Respondent's Jessup distribution facility receives 12 to 15, 53-foot trailers daily. The trailers contain furniture sent from North Carolina. After unloading, the furniture is sorted and prepared for delivery to customers the following day. The employees at the facility are not represented by a collective-bargaining representative and about half of them are Spanish-speaking. Employees are given handbooks, written in Spanish or English, when they are hired. The handbook explains the Respondent's "open door policy," it states, in relevant part:

> Although the Company endorses and recommends the use of chain-of-command reporting it also provides an avenue for associates to access any and all levels of management regarding concerns of being treated different or unfairly. Should an associate feel that it is inappropriate to take his/her concerns to his/her supervisor, then the associate may approach the next level of supervision to discuss those issues.

[R. Exh. 1 at 15.]

Michael Ratzkin, the operations manager, is in charge of the facility. Ratzkin is not fluent in Spanish and his words were translated when he spoke to the employees in the lunchroom on April 26, 2002.

B. Events of April 26, 2002

The following factual findings require an assessment of the credibility of the witnesses. I have fully reviewed the entire record and carefully observed the demeanor of the witnesses. I have also considered the apparent interests of the witnesses; corroboration, or lack thereof; and the consistencies or inconsistencies within the testimony of each witness and between the testimony of each and that of other witnesses with similar apparent interests. Testimony in contradiction to that upon which the following factual findings are based has been carefully considered and discredited. See generally, *NLRB v. Walton Mfg. Co.,* 369 U.S. 404, 408 (1962). Based on the foregoing I conclude that the testimony of the General Counsel's witnesses is more reliable and trustworthy than the testimony of the Respondent's witnesses. In some instances, an interpreter was needed during testimony. Necessary allowances for unimportant testimonial variations, attributable to language difficulties, has been made. My observation of the demeanor of the General Counsel's witnesses persuades me that each was trying to tell the truth as best they could. They each appeared forthright, candid, and straightforward. In making the foregoing credibility findings I am cognizant that dischargee Amaya admitted that he began his employment with the Respondent under a false name and social security number. He also candidly testified that when he received, "good papers" and social security number, he told the Respondent and was permitted to continue in its employ until he was discharged for engaging in the events of April 26, 2002.

At approximately 9 a.m. on April 26 about 25 to 30 employees gathered in the employee lunchroom in anticipation of meeting with Ratzkin regarding a wage increase. The employees had been trying, without success, to meet with him over this issue for some time. After the employees were assembled dischargee Hugh Giralt asked Supervisor Edgar Ortiz to request that Ratzkin come to the lunchroom. When Ratzkin appeared some English speaking

employees said that they wanted a raise. Ratzkin angrily responded that this was not how to ask to meet with him. The employees then choose Supervisor Alex Bustillo to act as their translator, but Ratzkin ordered Bustillo to return to work and left. Ratzkin returned to lunchroom in 10 or 15 minutes and began shouting at the employees. He told them that he would not meet with them in groups but only one-on-one, and that if they did not like working for the Respondent they should punch out and leave. He told the employees to return to work and then he again left. Some employees returned to work, but approximately 13 remained in the lunchroom, hoping that Ratzkin would return so that they could be "listened to." Return he did, but only to order the employees to leave the building and threaten to call the police if they did not. The dischargees' timecards show that they were punched out between 45 minutes to an hour after they assembled in the lunchroom. The employees left the area, only to return about noon and sit peacefully on a grassy area adjacent to the driveway that leads into the parking lot. Ratzkin observed the individuals, summoned the police, and at the request of the police, the individuals departed the area.

The dischargees were initially suspended indefinitely pending investigation and later discharged for "gross insubordination" for refusing to return to work on April 26. According to the Respondent's position statement (GC Exh. 4) one of the reasons that the suspensions were converted to terminations is "the fact of their subsequent return to Company property and refusal to leave until the police were called." Ratzkin testified unequivocally that he decided to terminate the employees and that their return had nothing to do with their terminations. When asked on direct examination to what extent the Respondent was motivated to discharge the employees because of their participation in the meeting his denial was more equivocal. "I'm not going to say it wasn't considered. We had talked about it, but it really had very little, if anything, to do with their termination" (Tr. 211).

C. Analysis and Discussion

In *Cambro Mfg. Co.,* 312 NLRB 634 (1993), the Board, quoting from the Seventh Circuit's decision in *Molon Motor & Coil Corp. v. NLRB,* 965 F.2d 523 (1992), summarized the legal framework for analyzing the extent to which in-plant work stoppages are protected by Section 7 of the Act.

> The concerted activities at issue here (i.e., an on-the-job work stoppage) is a form of economic pressure entitled to protection under Sec. 7 of the Act. See *NLRB v. Washington Aluminum Co.,* 370 U.S. 9, 15 (1962) (work stoppage to protest lack of heat during harsh winter protected activity under Sec. 7). Not every work stoppage is protected activity, however, at some point, an employer is entitled to assert its private property rights and demand its premises back. The line between a protected work stoppage and an illegal trespass is not clear-cut, and varies from case to case depending on the nature and strength of the competing interests at stake. See *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). Drawing that line requires courts to balance "whether the *means* utilized by the employee in protesting, when balanced against the employer's property rights, are entitled to the protection of the Act.'' *Peck, Inc.*, 226 NLRB 1174, 1175 (1976) (Member Penello, concurring); compare *Golay & Co. v. NLRB*, 371 F.2d 259, 262 (7th Cir. 1966) (work stoppage protected because employer refused to discuss the matter and hastily discharged the workers without any warning to leave the property), cert. denied 387 U.S. 944 (1967); *Roseville Dodge, Inc. v. NLRB*, 882 F.2d 1355, 1359 (8th Cir. 1989) (peaceful work stoppage on the shop floor, lasting several hours, protected, concerted activity); *NLRB v. Pepsi-Cola Bottling Co.*, 449 F.2d 824, 829–830 (5th Cir. 1971) (peaceful, unobtrusive work stoppage protected activity and employer's order to leave

> plant hindered ability to present grievances), cert. denied 407 U.S. 910 (1972) with *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 252, 255 (1939) (employees who seized and retained possession of employer's plant for several days engaged in illegal trespass); *Advance Indus. Div.-Overhead Door Corp. v. NLRB*, 540 F.2d 878,885 (7th Cir. 1976) (workers who neglected ordinary grievance procedure and refused to leave premises after shift ended engaged in illegal trespass);*Cone Mills Corp. v. NLRB*, 413 F.2d 445 (4th Cir. 1969) (workers who continued their inplant work stoppage in spite of established grievance procedures and a hearing from management engaged in illegal trespass); *Peck, Inc.*, 236 NLRB at 1180 (workers who occupied the employee lunchroom after shift ended engaged in illegal trespass). (Footnote omitted.)

312 NLRB at 635. More recently the Board has held that "when an in-plant work stoppage is peaceful, is focused on a specific job-related complaint, and causes little disruption of production by those employees who continue to work, employees are 'entitled to persist in their in-plant protest for a reasonable period of time.' *Cambro Manufacturing Co.,* 312 NLRB 634, 636 (1993)." *TPA, Inc.,* 337 NLRB 282 (2001). Counsel for the General Counsel submits that at all times each of these conditions—which distinguish a protected in-plant work stoppage from an unprotected sit-down strike—were satisfied. Accordingly, argues the counsel for the General Counsel, when the Respondent suspended and later discharged the employees, it violated Section 8(a)(1) of the Act.

The Respondent contends that the in-plant work stoppage should be found unprotected for essentially two reasons: the employees interfered with other employees and disrupted operations and; because of the Respondent's open door policy Ratzkin had talked to, and agreed to make himself available to the employees. Thus, there was no need for a work stoppage and consistent with the holding in *Cambro,* above, the work stoppage was unprotected from the beginning.

I have found no credible evidence to suggest that all the events on April 26 were anything but peaceful. There is no evidence that the work stoppage disrupted production by those employees who continued to work. Accordingly, I find that the counsel for the General Counsel has established that the employees in-plant work stoppage was protected, concerted activity at the outset. In *Cambro,* above, a Board panel majority also found the in-plant work stoppage was peaceful and protected when it began. The panel majority further found that the in-plant work stoppage became unprotected when it continued beyond a reasonable period of time.

In *Cambro* the employees stopped work at between 2:30 and 3 a.m. and the Board determined that the point when the employer was entitled to reclaim the use of its entire premises was between 4 and 4:30 a.m. It was at that point that the employees had been assured the opportunity to meet with the employer's general manager, in accordance with the established past practice, under the open door policy. It was also at this point that the employees had been ordered, on three occasions, to return to work. The last two directives offered the employees the choice of returning to work or clocking out, leaving the premises, and returning for the scheduled meeting with the general manager, which was to occur in a few hours.

In finding *Cambro* consistent with *Roseville* and *Pepsi-Cola*, above, the panel majority analogized the employer's open door policy to an established grievance procedure, a factor that was absent in *Roseville* and *Pepsi-Cola.* In so doing the majority noted that the employees had used the open door policy to resolve grievances, on two occasions, within the same month as the in-plant work stoppage, *Cambro,* at 634. In fact, part of the reason given for the in-plant

work stoppage was the general manager's failure to respond to employee concerns addressed in a previous meeting. Accordingly, the panel majority found that the employer's second order that the

> employees return to work or leave the plant and return later for the meeting served the Respondent's immediate interest in maintaining its established grievance procedure and placed no undue restriction on those employees' right to present grievances within a few hours pursuant to that procedure. . . . Further in-plant refusals to work served no immediate protected employee interests and unduly interfered with the employer's right to control the use of its premises.

312 NLRB at 636. In contrast this record is devoid of evidence that the employees and the Respondent had an established past practice of using the Respondent's open door policy as a meaningful avenue of grievance resolution. The three dischargees testified to signing a form indicating that they had received and read the handbook "completely." I credit their testimony that they were not aware of the Respondent's open door policy. Ratzkin's statements regarding his accessibility were exaggerated and generalized—"employees come to see me all day long, 'I have employees come to see me with personal problems all the time.'" He did relate several stories involving individual employees approaching him for individual solutions, to individual problems. (Tr. 186–187.) His stories are consistent with the credited testimony that he was only willing to speak one-on-one with the employees (Tr. 156). The Respondent's open door policy, in reality, did not allow for group action, in contrast to the open door policy in *Cambro.*

Also unlike *Cambro,* Ratzkin placed unnecessary restrictions on the employees' right to present grievances by not allowing them to fully articulate the reasons for the in-plant work stoppage. *Cambro,* at 634. Elmer Pastora credibly testified that the employees remained in the lunchroom, hoping that Ratzkin would return, because "we wanted to be listened to. . . . [W]e wanted to talk about the work pressures and the wages." (Tr. 157, 161.) When told to leave the premises, unlike the employees in *Cambro,* the employees complied immediately. Thus, another significant distinguishing factor between this case and *Cambro* is that when the Respondent asserted its right to control its premises the employees left the lunchroom as directed. Additionally, the entire in-plant work stoppage occurred during the employees' normal work hours. Accordingly, I find that the employees never lost the protection of the Act during while engaged in their in-plant protest.

Based on the foregoing I find that the counsel for the General Counsel has proved that at all times the in-plant work stoppage was peaceful, focused on specific job related complaints, caused no disruption of work performed by the employees who choose to continue to work, and was ongoing for a reasonable period of time, according I find that the employees never lost the protection of the Act. The Respondent admits that the employees were suspended, and later discharged, for "Gross insubordination—failed to follow direct order" (GC Exh. 5). Ratzkin stated that the reason was that the employees had been offered and refused, on three separate occasions, to return to work. I have found that the counsel for the General Counsel has established that the employees where engaged in a lawful, protected, in-plant work stoppage when they were discharged for their refusal to return to work. Accordingly, I find that the Respondent has violated Section 8(a)(1) of the Act as alleged.

Because there is no dispute as to the reason for the discipline (the employees refusal to return to work), the Respondent's motivation is not at issue and therefore the analysis in *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), is inappropriate. *LA-Z-Boy Midwest,* 340 NLRB No. 10 (2003); *Shamrock Foods Co., v. NLRB,* 346 F.3d 1130 (D.C. Cir. 2003), rehearing denied, enfg. 337 NLRB 915 (2002); see also *Air Contact Transport, Inc.,* 340 NLRB No. 81 (2003).

In the interest, however, of administrative convenience, economy, and efficiency I will address the counsel for the General Counsel's additional argument that even were it to be concluded that the employees somehow lost the Act's protection at some point before they left the lunchroom, the Respondent still violated the Act, because the employees were discharged in retaliation for engaging in protected concerted activity.

I find the following dialogue, between Respondent's counsel and Ratzkin dispositive of counsel for the General Counsel's additional argument:

> Q. To what extent was the company motivated to fire the 13 employees because of their participation in the meeting?
>
> A. I'm not going to say it wasn't considered. We had talked about it, but it really had very little, if anything, to do with their termination.

(Tr. 211.) I find Ratzkin's testimony is an admission that the employees participation in the meeting was, at the very least, part of the reason for their discharge. I find my conclusion supported by the Respondent's shifting reasons for the discharges. Thus, in response to the same question, concerning the extent of the Respondent's motivation to terminate the employees for returning to the property later that afternoon, Ratzkin states unequivocally "I did not feel that the return late that afternoon had anything to do with the termination." (Tr. 211.) Ratzkin's testimony is not only inconsistent with the Respondent's position statement:

> Upon further review, based on the timing and gravity of their insubordination, the fact that they were given multiple chances to end their sit down strike and return to work, and the fact of their subsequent return to Company property and refusal to leave until the police were called, their suspensions were converted into terminations.

(GC Exh. 4 at 3), but it is inconsistent with his testimony on the previous day. Thus, in response to the General Counsel's question, regarding each specifically named dischargee in the complaint, if that specific individual was discharged for being in the cafeteria, refusing to return to work, and returning to the facility, Ratzkin answered in the affirmative (Tr. 89–95). Shifting reasons given for an employer's action is evidence of pretext. When a pretextual reason for discharge is given, it may be inferred that the employer wishes to hide the real reason, which in this case, is because the employees were engaged in concerted protected activity. See *Sherwin-Williams Co.,* 313 NLRB 163 (1993). Accordingly, I find in the alternative, that the Respondent discharged the employees in retaliation for engaging in protected concerted activity and to warn other employees as to consequences of engaging in protected concerted activities. E.g., *Dove Restaurant, Inc.,* 232 NLRB 1172, 1177 fn. 20 and cited cases (1977).

D. Johnnie's Poultry Allegations

At the close of the hearing I granted counsel for the General Counsel's unopposed motion to amend the complaint to include two allegations that the Respondent violated Section 8(a)(1) of the Act by failing to provide the safeguards required by *Johnnie's Poultry,* 146 NLRB 770 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965), before conducting employee interviews in preparation for the unfair labor practice proceeding.

The Board and the courts have long recognized that an employer has a legitimate need to interview employees in order to ascertain facts necessary in preparing it's defense in an unfair labor practice proceeding. The Board permits an employer to exercise the privilege of interrogating employees on matters involving their Section 7 rights without incurring a violation

of Section 8(a)(1) by generally requiring that the employer maintain strict compliance with the safeguards set forth in *Johnnie's Poultry.* E.g., *Pratt Towers, Inc.,* 339 NLRB No. 27, slip op. at 26 (2003). Counsel for the General Counsel specifically alleges that the Respondent's counsel conducted interviews with two employee witnesses, in preparation for the unfair labor practice proceeding, without assuring the employees that there would be no reprisals resulting from the interview and that participation in the interview was voluntary.

The testimony of Bessy Beltran (Tr. 299–302) and Ana Mejia (Tr. 338–342) supports counsel for the General Counsel's allegations. Respondent's counsel argues, in brief, that the record is unclear and that the witnesses were somewhat confused by the General Counsel's questions. There may have been some initial confusion, attributable to language difficulties or what appeared to be nervousness on the part of the witnesses, but counsel for the General Counsel clarified any confusion by her patient and persistent questioning. Respondent's counsel, over the objection of the counsel for the General Counsel, was permitted wide latitude on redirect examination. A reading of the witnesses' testimony on redirect examination demonstrates that this opportunity was not used to clarify any perceived residual confusion. The Board has consistently required that an employer give each employee it interviews in preparation for an unfair labor practice proceeding an explanation as to the purpose of the questioning, assurances that no reprisals will result from the questioning, and that participation in the questioning is voluntary. Failure to administer even one of the safeguards, absent unusual circumstances not present here, is sufficient to find that the Respondent violated Section 8(a)(1). E.g., *Bill Scott Oldsmobile,* 282 NLRB 1073, 1075 (1987), and cases cited.

Accordingly, I find that by questioning Beltran and Mejia in preparation for the unfair labor practice proceeding and failing to assure them that their participation was voluntary and that no reprisals would be forthcoming, the Respondent violated Section 8(a)(1) of the Act. See, e.g., *Le Bus,* 324 NLRB 588 (1997); *Mathis Electric Co.,* 314 NLRB 258, 264 (1994).

Conclusions of Law

1. Hmy Roomstore, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act by:

(a) Suspending, discharging, or otherwise discriminating against employees for engaging in concerted protected activity, specifically engaging in a protected in-plant work stoppage.

(b) Interviewing employees in preparation for an unfair labor practice proceeding without advising them that their participation was voluntary and giving them assurances that no reprisals would be forthcoming.

3. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having unlawfully suspended and then discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of suspension to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and it must remove from its files any reference to the unlawful suspension and discharge of those employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The Respondent, Hmy Roomstore, Inc., Jessup, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending, discharging, or otherwise discriminating against any employee for engaging in protected concerted activity.

(b) Interviewing employees in preparation for unfair labor practice proceedings without advising them that their participation is voluntary and assuring them that no reprisals will be forthcoming.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer the employees named below full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make the employees named below whole for any loss of earnings and other benefits suffered as a result of our unlawful action against them, in the manner set forth in the remedy section of the decision. The employees are:

Francisco Diaz-Amaya
Lidio Diaz-Amaya
Marvin Bonilla
Jose Diaz
Oscar Espinoza
Pedro Flores
Hugo Hiralt
Ulices Majano
Juan Mejia
Jorge Moreno
Elmer Pastora
Jose Rodriguez
Jorge Rubio

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspensions and discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the unlawful suspensions and discharges will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Jessup, Maryland copies of the attached notice marked "Appendix."[2] Copies of the notice, in English and Spanish, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 26, 2002.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 7, 2004

John T. Clark
Administrative Law Judge

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."